BLEED THROUGH

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 72-2954.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

FRANK RAGANO, *Defendant-Appellant.*

April 9, 1973.

By a judgment of the United States District Court for the Middle District of Florida, at Tampa, Gerald B. Tjoflat, J., the defendant was convicted of the crime of filing of income tax return which he did not believe was true in every material respect and he appealed. The Court of Appeals, Grooms, District Judge, held, inter alia, that error of court in admitting testimony of revenue agent of an alleged admission by defendant as to another person's testimony before state commission to the effect that defendant had earned stock as a finder's fee and as an attorney's fee although defendant neither tacitly nor expressly admitted the truth of the testimony by the other who was not a witness, was not harmless, where court's instruction anticipated an inculpatory response which did not materialize and was misdirected.

Reversed and remanded.

Thornberry, Circuit Judge, filed a specially concurring opinion.

1. Criminal Law § 1159.2(9), 1154.4(1)

It is not for reviewing court to weigh evidence or determine credibility of witnesses.

2. Criminal Law § 1159.2(5)

Verdict of jury must be sustained if there is substantial evidence, taking view most favorable to the Government, to support it.

3. Criminal Law § 1159.2(7)

Reviewing court in considering sufficiency of evidence does not determine whether it establishes guilt beyond reasonable doubt but only whether the evidence would permit trier of fact to find defendant guilty beyond reasonable doubt.

4. Internal Revenue § 2451

There was sufficient evidence to establish defendant's guilt of violation of statute making it a crime to willfully make and subscribe income tax return which taxpayer does not believe to be true and correct as to every material matter arising out of transaction in which defendant acquired stock in real estate development corporation for which he had arranged a loan for developer. 26 U.S.C.A. (I.R.C. 1954) § 7206(1).

5. Criminal Law § 878(4)

Trial court did not err in denying motion of defendant, found guilty of violating statute making it a crime to willfully file income tax return which taxpayer does not believe to be true and correct, for an acquittal on ground of inconsistency of verdict which found defendant guilty on such charge but acquitted him on counts one and two of the indictment based upon defendant's alleged failure to report the receipt of the value of the stock as income for specific year and for making a false statement as to the same. 26 U.S.C.A. (I.R.C. 1954) § 7206(1).

BLEED THROUGH

6. Criminal Law § 407(1)

Where defendant neither tacitly nor expressly admitted testimony of another before state commission, testimony of such other person before commission was not admissible as an implied admission in prosecution of defendant in which such other person was not a witness and was not subject to cross-examination. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

7. Criminal Law § 407(1)

Where witness' total response adds up to a clearcut denial, no theory of implied admission is available to make such evidence admissible as an exception to a hearsay rule.

8. Criminal Law § 662(1)

Confrontation clause of Sixth Amendment is not violated as long as the declarant is testifying as a witness and is subject to full and effective cross-examination. U.S.C.A. Const. Amend. 6.

9. Criminal Law § 1169.5(5)

Error of court in admitting testimony of revenue agent as to an alleged admission by defendant regarding another person's testimony before state commission to the effect that defendant, charged with crime of filing income tax return which he did not believe was true in every material respect, had earned stock as a finder's fee and as an attorney's fee although defendant neither tacitly nor expressly admitted the truth of the testimony by the other who was not a witness in prosecution, was not harmless, where court's instruction anticipated an inculpatory response which did not materialize and was misdirected. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

10. Criminal Law § 470

Mere qualifying of witness as an expert does not necessarily render his every conclusion immune from challenge, and expert should not be allowed to state his conclusions on the whole case.

11. Criminal Law § 419(1)

Generally, testimony of an essentially factual nature should not be predicated on opinions, inferences and conclusions of others.

12. Criminal Law § 470

Trial court committed error in refusing to strike ultimate conclusion testified to by expert witness as to why defendant, charged with crime of filing income tax return which he did not believe to be true in every material respect, should have reported the receipt of stock in 1967 return although answer related primarily to return involved in another count since answer went to the key issue involved in count of which defendant was convicted. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

13. Criminal Law § 1038.1(5)

Court's instruction on presumption of knowledge of law which properly submitted to jury the question of defendant's ignorance of law as that question related to specific intent was not such as to constitute plain error in absence of objection by defendant who was convicted of filing income tax return which he did not believe to be true in every material respect. 26 U.S.C.A. (I.R.C.1954) § 7206 (1); Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.A.

14. Criminal Law § 822(6)

Taking court's instruction as a whole there was no error in any failure of court to define essential elements com-

BLEED THROUGH

prising the crime of filing an income tax return which taxpayer does not believe to be true in every material respect. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

Michael L. Kinney, St. Petersburg, Fla., John R. Parkhill, Edward M. Waller, Jr., Tampa, Fla., for defendant-appellant.

John L. Briggs, U. S. Atty., Jacksonville, Fla., Claude H. Tison, Jr., Asst. U. S. Atty., Tampa, Fla., for plaintiff-appellee.

Before BELL and THORNBERRY, Circuit Judges, and GROOMS, District Judge.

GROOMS, District Judge:

The appellant was convicted on Count III,, of a three count indictment, of a violation of 26 U.S.C.A. § 7206(1).[1]

Count III related to appellant's 1968 return and charged that on June 16, 1969, appellant knowingly made a false declaration in claim to have sold 20 shares of Two Seasons, Inc. stock for $230,022.20 that he had purchased for $50,000.00, and that the income of $180,022.20 was properly treated as a long term capital gain.

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[1] "Any person who——

(1) *Declaration under penalties of perjury.* — Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * * * * * * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

In late 1964 and early 1965 appellant assisted S. A. Rizzo in obtaining a $5,000,000.00 loan from the Pension Fund of the Teamster's Union. The loan was to be used to buy and develop 700 acres of land just north of Miami, Florida. The land which had an appraisal value of $9,500,000.00 was purchased for $3,500,000.00. Two Seasons, Inc. was organized by Rizzo for the purpose of acquiring, holding and developing the land. The property purchased, together with the balance of the loan proceeds, was transferred by Rizzo to the corporation.

On January 3, 1967, a certificate representing 20 shares of Rizzo's stock in Two Seasons, Inc., a 40% interest, was transferred to appellant, who on the same date executed a non-interest bearing demand note to Rizzo in the amount of $50,000.00.[2] On March 24, 1967, appellant's stock certificate was cancelled, and reissued to Rizzo, ostensibly for use by Rizzo as collateral. On November 6, 1967, the shares were reissued to appellant, who claimed that during the interim the stock was in effect held in trust for him by Rizzo.

On January 12, 1968, appellant transferred his stock to Rizzo in consideration of the cancellation of the $50,000.00 note of January 3, 1967, and Rizzo's assumption of appellant's indebtedness to the County National Bank of North Miami Beach in the amount of $68,364.08, to the Central Bank of Tampa in the amount of $51,108.12, and to Two Seasons, Inc. in the amount of $60,500.00, a total of $230,022.20.

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[2] Much evidence was taken as to another note of July 16, 1965, executed by appellant to Rizzo in the amount of $50,000.00. Appellant claims that that note evidenced the purchase price of the 20 shares of stock, but that he was unable to borrow money to pay off the note and that Rizzo would not issue the stock; that he was informed that the note had been lost; that Rizzo wished a new note; that he agreed to give a new note if the stock was issued to him; and that the January 3, 1967, note was executed and the stock issued pursuant to that understanding.

BLEED THROUGH

Beginning in 1965 and over a period of approximately three years Two Seasons paid fees and expenses and made loans to or on behalf of appellant of $252,332.09. However, no amount was paid on the principal sum of $50,000.00.

The Government's basic charge stems from its claim that the real consideration for the issuance of the twenty shares of Two Seasons stock was not a $50,000.00 debt evidenced by the note but fees earned by appellant in procuring the loan from the Pension Fund.

[1-3] A careful review of the evidence covering more than eleven hundred pages of the transcript, leads us to the definite conclusion that the sufficiency of the evidence as to appellant's guilt was for the jury under the guiding principles so frequently announced. Glasser v. United States, 315 U.S. 60, 80,[3] 62 S.Ct. 457, 469, 86 L.Ed. 680; Gordon v. United States, 438 F.2d 858, 867[4] (5th Cir.).

[4] In reaching this conclusion we could not overlook appellant's testimony at a hearing in June 1968, before the Shevin Committee of the Florida legislature in the course of its investigation into organized crime, in which he testified that the Two Seasons stock was a part of his fee—"a combination of attorney's fees and I am in hope of finder's fees." Nor appellant's deposition of October 7, 1968, taken in connection with a libel suit that he filed against Time, Inc., wherein he deposed that he had achieved ownership of the stock, "partially for legal services and partially as a finder's fee." Nor his second deposi-

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[3] "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. United States v. Manton, 2 Cir., 107 F.2d 834, 839."

[4] "[I]n considering the sufficiency of the evidence who do not determine whether it establishes guilt beyond a reasonable doubt, but only whether the evidence would permit the triers of fact to find the defendants guilty beyond a reasonable doubt."

tion on December 26, 1968, in the same case wherein he again deposed to substantially the same statement; nor his testimony in the case as follows:

> "[B]ut the ultimate result was that I gave him $50,000 note for the stock, and that's how I was able to acquire the stock, regardless of how I labeled it.
>
> Q. Regardless of how you labeled it, sir?
>
> A. That's right. If you recall, Mr. Dempsey, I said this time and time again, it is a combination of finder's fee and legal fees. I left that up to my accountant. I left it up to the IRS Agent. But when you come down to it, whether after all that is said and done, I never would have gotten the stock without the $50,000 note."

This answer appears to sum up appellant's construction of the consideration for the stock as well as his qualifications of prior statements.

Likewise, on the issue of wilfulness and intent we have not overlooked appellant's evidence that he laid the whole transaction before the agents preceding the filing of his 1968 return and that he cooperated with them in supplying whatever information that he had in his possession. The fact that appellant bared his breast to the investigating agents and extended his cooperation would not exempt him from prosecution and the penalties of the law, if he, nevertheless, proceeded to do what the law proscribed.

[5] Counts I and II of the indictment were grounded upon appellant's alleged failure to report the receipt of the value of the stock as income for 1967, and in making a false statement as to same, respectively. The jury found appellant not guilty on these counts. He contends that there is such repugnancy and inconsistency between the not guilty verdicts on Counts I and II and the guilty verdict on Count III, that Count III cannot stand. Throughout the

BLEED THROUGH

trial appellant took the position that the stock had no value on the date of its acquisition in January 1967; that its enhancement from zero to the sum for which it was sold in 1968 resulted from the development of the property during that period. Under this theory the jury could well have found that there was no value to report for 1967, or, at least, could have held that there was ample doubt about the value. Other assumptions could be, but will not be, indulged as a basis of the jury's verdict on Counts I and II. The court did not err in denying appellant's motion for judgment of acquittal on the ground of inconsistency of verdicts. Dunn v. United States, 284 U.S. 390, 52 S.Ct. 40, 76 L.Ed. 520; United States v. Panzavecchia, 446 F.2d 1293 (5th Cir.).

Appellant insists that there was error to reverse in the action of the court in admitting the testimony of Revenue Agent Greenwald of an alleged admission by appellant as to Rizzo's testimony before the Florida State Beverage Commission to the effect that appellant had earned the stock "as a finder's fee, an attorney's fee." The issue was first presented in the course of the prosecution's opening statement and was represented to the court as being an admission by appellant of Rizzo's testimony. Over objection the court ruled that appellant having responded to the statement, the statement of the agent became "res-gestae of admission."

The question was again presented in the course of the direct examination of appellant's accountant, Andretta. The court stated that anything that appellant said in the course of the interview with the agent would constitute "an admission exception to the hearsay rule," and that it was necessary in order to determine the extent of the admission to have not only what appellant said but what was said to appellant. The court further stated that he would instruct the jury that it could not consider the comments made by Rizzo to prove the truth of the assertions of

Rizzo, but that the jury could consider the comments in the context of appellant's response.[5]

When Greenwald took the stand, counsel for appellant reminded the court that he had objected to the conversation in the October 1968 conference as to what Rizzo had testified to when the accountant was called. The court replied by instructing the jury as to the consideration to be given to the conversation, the statement of Rizzo, and the response of appellant,[6] following which Greenwald testified that:

> "A. I told Mr. Ragano that I was aware of testimony that Rizzo had given to the State Beverage Department, wherein Mr. Rizzo had testified that Ragano had received the stock for services rendered. I asked Mr. Ragano whether that was true, whether they were legal fees. Mr. Ragano replied no, it was not for services rendered in that he had bought the stock for $50,000 note. He said the books of Two Seasons would bear this out.

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[5] Counsel for appellant stated that he would object when the time came, in reply to which the court ruled that it was not necessary to object.

[6] "THE COURT: Ladies and Gentlemen of the Jury, in telling you what transpired between himself, Mr. Greenwald, and the defendant in the form of conversation, it is anticipated that Mr. Greenwald is going to relate the conversation, and in relating the conversation he will say some things that Mr. S. A. Rizzo told him in the defendant's absence. In other words, during his conversation with the defendant, he may occasionally say, 'Mr. S. A. Rizzo said such and such to me, and what do you have to say about that,' or words to that effect.

"Now, you may not consider what he relates, the witness relates as having been said by S. A. Rizzo out of the defendant's presence. You may not consider that as going to the truth of the matter of the statement that S. A. Rizzo said, but you may consider the defendant's response to those statements."

BLEED THROUGH

"Q. Did he indicate if he was aware of Mr. Rizzo's testimony?

"A. He said he was aware of it."

Greenwald also testified with respect to a further conference in May 1969, when Mr. Adair, an agent now deceased, was present:

"A. Mr. Adair pointed out to Mr. Ragano that the statements of Rizzo that the stock had been given to Ragano as a legal fee, and that there was no other consideration.

Ragano said that he did not know why Rizzo had testified this way, but it was not true."

Defendant's witness Whyte was cross-examined as to a telephone conversation between him and Greenwald which related to the witness's awareness that Rizzo had testified before the Beverage Commission that the stock had been given to appellant for services rendered.

In his closing argument the prosecutor put the matter flatly as follows:

"[A]nd we know from the evidence that Mr. Rizzo testified that the payments of stock which had been made to Mr. Ragano in January of 1967 were payments to Mr. Ragano for legal fees."

[6, 7] Appellant neither tacitly nor expressly admitted the alleged statement by Rizzo. On the contrary he flatly denied the truth of any such statement. Certainly in the face of his denial, appellant's knowledge of Rizzo's testimony can hardly be construed as an admission. Where the witness's total response adds up to a clear-cut denial, even any theory of implied admission is not available. McCormick, Handbook of the Law of Evidence, at 528 (1954 Ed); Com. v. Twombly, 319 Mass. 464, 66 N.E.2d 362, and

People v. Wysocki, 267 Mich. 52, 255 N.W. 160. "A flat denial [is] in no sense an admission." *Twombly, supra.*

[8, 9] The confrontation clause of the Sixth Amendment is not violated as long as "the declarant is testifying as a witness and subject to full and effective cross-examination." California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489. But here Rizzo did not testify, and, of course, was not subject to cross-examination. In short the prosecutor succeeded in getting Rizzo's testimony before the jury and in exploiting it in his closing argument without calling Rizzo as a witness. He now seeks to avoid the consequences of his action by a resort to the harmless error rule and the court's instruction that the jury could not consider what Greenwald related as having been said by Rizzo as going to the truth of Rizzo's statement. Successfully getting Rizzo's statement before the jury was not the result of a passing incident but of a persistent and sustained effort. The court's instruction anticipated an inculpatory response by appellant that did not materialize, and was consequently misdirected.

In the recent case of United States v. Johnson, 5 Cir., 439 F.2d 885 (1971), where hearsay testimony was introduced solely to show that customs agents were on the lookout for defendant, and not to show the truth of what the informer said, and where the court accepted the ruling and instructed the jury accordingly, Judge Rives, speaking for this court, said:

> "The government next argues that the statements of the informer at most constituted harmless error under Fed.R.Crim.P. 52(a). Erroneous admission of evidence can often be corrected by appropriate jury instructions. Conner v. United States, 5 Cir. 1963, 322 F.2d 647. But before a constitutional error can be held harmless, the court must believe it harmless beyond a reasonable doubt. Chapman v. California, 1967, 386 U.S. 18, 22-24, 87 S.Ct. 824, 17 L.Ed.2d 705."

BLEED THROUGH

In Bruton v. United States, 391 U.S. 123, 137, 88 S.Ct. 1620, 1628, 20 L.Ed.2d 476, the court ruled that it could not "accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination," in the context of a joint trial, where a co-defendant implicated petitioner in a written cofession, but did not take the stand.

In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923, where it was held that the trial court was in error in admitting the transcript of the testimony of an absent witness taken on a preliminary hearing when the defendant was without counsel, the court stated:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

In Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790, involving a hearsay statement by a co-conspirator to the complaining witness some six weeks after transportation in violation of the Mann Act, the court stated:

> "It is contended that the statement attributed to the alleged co-conspirator was merely cumulative evidence, that without the statement the case against petitioner was so strong that we should hold the error harmless under 28 U.S.C. (1946 ed.) § 391. In Kotteakos v. United States, 328 U.S. 750 [66 S.Ct. 1239, 90 L.Ed. 1557], we said that error should not be held harmless under the harmless error statute if upon consideration of the record the court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict. . . . We cannot say that the erroneous admission of the hearsay declara-

> tion may not have been the weight that tipped the scales against petitioner."

Barton v. United States, 263 F.2d 894 (5th Cir.), was a case involving the admissibility of an unsigned statement of a co-defendant given out of the presence of the defendant, Mitchell, and a motion for a severance. The court in reversing ruled:

> "The sole reliance for Mitchell's protection was the court's instruction to the jury, several times repeated, not to treat the statement as evidence against Mitchell. Considering the substance and terms of Barton's statement, we doubt whether it was at all possible to carry out that instruction. To do so certainly would require twelve minds more perfectly disciplined than those of the average human jurors.
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> "The Government argues that a separate trial for Mitchell would have made no difference in the outcome, because 'Mitchell was bound hand and foot by the most awesome array of evidence imaginable, quite apart from the confession of Barton.' We cannot, however, substitute ourselves for the jury, whose duty it was to pass upon Mitchell's guilt or innocence."

See also, Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934.

Appellant's "admissions" with respect to the consideration for the stock were not unequivocal but qualified. The jury should have been permitted to consider their weight unburdened by inadmissible hearsay. We conclude there was error and that the evidence of guilt in this case was not so overwhelming as to render the error harmless, as was found by the Supreme Cout in Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340, and by this

BLEED THROUGH

court in Hoover v. Beto, 5 Cir., 467 F.2d 516, under the facts of those cases.

Appellant challenges the action of the court in overruling his motion to strike the answer of witness Brock as to why appellant should have reported the receipt of the stock in his 1967 return. The witness answered: "Because this is the year that he received pay for services rendered in the form of stock."

Though the question and answer related primarily to the 1967 return involved in Count I, the answer went to the key issue involved in Count III—the crux of the Government's charges against appellant in reporting the transaction as a long term capital gain rather than ordinary income.

[10, 11] The Court is not unmindful of the modern trend to abandon the rule allowing experts to express an opinion upon ultimate issues when the opinion is otherwise admissible.[7] The mere qualifying of a witness as an expert, Paschal v. United States, 306 F.2d 398 (5th Cir.), does not necessarily render his every conclusion immune from challenge. Experts "ought not to [be] asked or allowed to state their conclusions on the whole case." United States v. Spaulding, 293 U.S. 498, 506, 55 S.Ct. 273, 277, 79 L.Ed. 617. "It is generally agreed that testimony of an essentially factual nature should not be predicated on the opinions, inferences and conclusions of others." *Paschal, supra.*

The Sixth Circuit in Kentucky Trust Co. v. Glenn, 6 Cir., 217 F.2d 462, had for consideration the claim that certain trusts had been created in contemplation of death. The question and the answer by the agent of the Internal Revenue Service were as follows:

> " 'Upon what facts or circumstances, did you base your determination that the Trust estates were part of

[7] See proposed New Federal Rules of Evidence, Rule 704 and note thereunder.

> Mr. Schmidt's estate?' The answer was: 'Well, my determination was made by the fact that the Will, the Trust instruments and the life insurance policy assignments were all made at practically the same time.''

The court, in ruling that the trial court erred in overruling the objection, stated:

> "The testimony of the government witness as to why he made the determination to the effect that the trusts in question were made in contemplation of death invaded the province of the jury and permitted the witness to express his opinion as to the ultimate fact. The witness should not have been permitted to testify, in effect, why he believed the deceased made the trusts in contemplation of death. The testimony was incompetent and prejudicial."

[12] The court erred in overruling appellant's motion to strike.

[13] The court's instruction on presumption of the knowledge of the law [8] was not such as to constitute plain error under Rule 52(b), Fed.R.Crim.P. There was no objection to the charge. The first part of the instruction is identical to the charge before the court in Edwards v. United States, 334 F.2d 360 (5th Cir.), Note 3, and held to be not such plain error as to require a reversal. The last sentence properly submitted to the jury the question of appellant's ignorance of the law as that question related

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[8] "It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done. However, evidence that the accused acted or failed to act because of ignorance of the law, is to be considered by the Jury in determining whether or not the accused acted or failed to act with specific intent, as charged."

BLEED THROUGH

to specific intent. The court's action finds support in Wardlaw v. United States, 5 Cir., 203 F.2d 884, where it was held that whether the defendant acted under a bona fide misconception of income tax law in failing to report income was for the jury on the issue of knowledge and willfulness.

[14] Taking the court's instruction as a whole, we likewise find no error in any failure of the court to define the essential elements comprising the offense charged in Count III.

Appellant claims that he was denied a fair trial because of the cumulative effect of a series of prejudicial and unfair tactics by counsel for the Government. We have carefully considered these claims, and must frankly state that in certain particulars counsel went to the outer limits of legality. However, in those particulars the court was prompt and firm in its efforts to eradicate any resulting prejudice; and in view of such efforts we are reluctant to and will not hold that it did not succeed in doing so.

Although the court's action in overruling the objections to the admission in evidence of the income tax returns of Rizzo and Two Seasons, Inc., was not challenged on this appeal, we, however, in the interest of trial economy deem it

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APPENDIX B

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 74-2376.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

FRANK RAGANO, *Defendant-Appellant.*

Oct. 14, 1975.

Following a remand by the United States Court of Appeals, 476 F.2d 410, the United States District Court for the Middle District of Florida, at Tampa, Ben Krentzman, J., entered a judgment finding defendant guilty on five counts of income tax charges including charge of conspiracy, and he appealed. The Court of Appeals, Simpson, Circuit Judge, held inter alia, that following the defendant's successful appeal of his conviction for false swearing to income tax return, Government was not precluded by collateral estoppel or double jeopardy from trying the defendant on the false swearing charge on a wholly new theory, that corporate reports were properly admitted under the Business Records Act, that corporate tax returns were properly admitted for limited purpose, that court properly refused to allow admission of letter from person not a witness and that evidence was sufficient to sustain conviction.

Affirmed.

1. Criminal Law § 193

Where defendant by successful appeal secures reversal of a conviction, a retrial for the same events does not put him twice in jeopardy. U.S.C.A.Const.Amend. 5.

BLEED THROUGH

2. Judgment § 713(1)

Doctrine of "collateral estoppel" means simply that when an issue of ultimate fact has been once determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

See publication Words and Phrases for other judicial constructions and definitions.

3. Judgment § 751

Where Government prosecuted taxpayer for false swearing on tax return on theory that although taxpayer's sale of stock was a valid long-term capital gain transaction, original receipt of stock by taxpayer was income which should have been reported on his earlier return as income and taxpayer successfully appealed his conviction, Government was not precluded by collateral estoppel from retrying taxpayer on same charge of false swearing on new theory that the stock transaction was a sham to disguise payments to taxpayer in the form of loans and that the loans were income to taxpayer on which income taxes were due and owing. 26 U.S.C.A. (I.R.C.1954) § 7206(1); U.S. C.A.Const. Amend. 5.

4. Criminal Law § 1177

Under concurrent sentence doctrine, if conviction is sustained as to conviction under count 1 of the counts as to which concurrent sentences were imposed it is unnecessary to determine legality of conviction under the remaining counts.

5. Conspiracy § 28(2)

Conspiracy is not the commission of crime which it contemplates and neither violates nor arises under statute whose violation is its object.

6. Conspiracy § 28(2)

Commission of substantive offense and entering a conspiracy to commit that offense are separate and distinct and ordinarily a person may be convicted or sentenced for both.

7. Criminal Law § 1192

Where defendant taxpayer was successful in obtaining reversal of conviction on count of complaint charging the making of a false declaration in tax return, upon retrial the Government was not precluded from adding to the indictment a count, not contained in the original indictment, charging conspiracy to defraud Government in the collection of revenue.

8. Criminal Law § 419(1), 436

Corporate reports filed with various departments of state of Florida purporting to list all directors, officers, and, in one instance, shareholders of corporation during period taxpayer purportedly owned stock satisfied requirements of Federal Business Records Act, qualified as exceptions to hearsay rule and were admissible in prosecution of taxpayer since motive to assure accuracy was fulfilled by fact that each was required by state to be filed as a condition of corporate existence and loss of corporate privilege could result from failure to file or by filing intentionally false documents. 28 U.S.C.A. § 1732(a); West's F.S.A. §§ 608.04, 608.041, 608.351.

9. Criminal Law § 436

To be admissible under the Business Records Act, records must be kept pursuant to some routine procedure designed to assure their accuracy, they must be created for motives that would tend to assure accuracy and they must not themselves be mere accumulations of hearsay or uninformed opinion. 28 U.S.C.A. § 1732(a).

BLEED THROUGH

10. Criminal Law § 444

Failure of Government to lay a foundation in form of testimony by employee of corporation as to procedures used in preparing and filing corporate documents was not fatal to their admission under the Business Records Act in taxpayer's prosecution for income tax violation, in light of stipulation as to their authenticity and fact that they were filed and prepared in the regular course of business. 28 U.S.C.A. § 1732(a).

11. Criminal Law § 436

Taxpayer's testimony as to his strained relations with corporate officer affected only the weight to be accorded to the corporate documents, admitted under the Business Records Act in income tax prosecution to show that transfer of stock to taxpayer and his sale thereof was a sham, and not their admissibility. 28 U.S.C.A. § 1732(a).

12. Criminal Law § 1169.2(7)

Since corporate records, admitted under the Business Records Act in prosecution of taxpayer for purpose of showing that stock transfers between corporation and taxpayer was a sham, were similar in form and tenor to documents which were already in evidence and which also failed to list taxpayer as either an officer or director, and both an employee of corporation and an officer testified that in the realm of their duties they had never any knowledge of taxpayer having authority of an officer or director of corporation, documents were merely cumulative of other evidence that taxpayer was not an officer or director and any error in their admission was harmless. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

13. Criminal Law § 486

Admission in prosecution of individual taxpayer, involved in corporate stock transaction of corporate tax re-

turns for limited purpose of use by government expert witnesses in arriving at valuation of corporation's stock was not error, and furthermore did not prejudice case of defendant taxpayer whose loan application valued stock greatly in excess of value placed thereon by government testimony. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

14. Criminal Law § 433

Where taxpayer's counsel in prosecution for false swearing on income tax return involving corporate stock transaction was permitted on cross-examination of taxpayer's accountant to use letter from corporate accountant to taxpayer's accountant to the full extent requested and subsequently taxpayer's attorney declined to call corporate accountant as a witness trial judge did not err in refusing to permit contents of letter to be published through taxpayer's accountant, since letter embodied the opinion of corporate accountant as to tax consequences of stock transactions.

15. Criminal Law § 1159.2(1)

Proper standard for review to be applied irrespectively of whether evidence is direct or circumstantial is whether reasonable minds could conclude that evidence was inconsistent with accused's innocence.

16. Internal Revenue § 2451.6

Evidence at second trial was sufficient to establish taxpayer's guilt of false swearing to income tax return notwithstanding fact that Government's theory in first trial resulting in conviction, which was reversed on appeal, was that although defendant acquired corporate stock in valid transaction he treated tax consequences incorrectly while at second trial Government proceeded on new theory that stock transactions were a sham to mask the payment of a finder's fee to taxpayer. 26 U.S.C. (I.R.C.1954) § 7206(1).

BLEED THROUGH

E. David Rosen, Miami, Fla., Michael L. Kinney, Thomas T. Steele, Tampa, Fla., for defendant-appellant.

John L. Briggs, U. S. Atty., Jacksonville, Fla., Claude Tison, Jr., Asst. U. S. Atty., Tampa, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM, SIMPSON and RONEY, Circuit Judges.

SIMPSON, Circuit Judge:

This appeal requires us to review for the second time the conviction upon income tax related charges of Frank Ragano, a Florida attorney. See *United States* v. *Ragano*, 5 Cir. 1973, 476 F.2d 410. A description of the prior proceedings before the district court and on appeal is essential to an understanding of the issues raised by the present appeal.

The appellant was charged in a three count indictment returned July 14, 1971, with tax evasion and false swearing. Count 1 charged him with tax evasion in his 1967 tax return in failing to report taxable income of $180,022.20, in violation of Title 26, U.S.C., Section 7201.[1] Count 2 charged appellant with knowingly making a false declaration of income, under penalty of perjury, in his 1967 tax return, in that he knowingly received substantial income in excess of that reported, in violation of Title 26, U.S.C.,

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[1] § 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Section 7206(1).[2] Count 3, related to Ragano's tax return for the calendar year 1968 and charged that he knowingly made a false declaration that he had sold for $230,022.20 certain shares of stock in Two Seasons, Inc., obtained by him in consideration for a $50,000 promissory note, and in the resulting claim that the income of $180,022.20 was properly treatable as long term capital gain, in violation of Title 28, U.S.C., Section 7206(1). At the trial on these counts the government contended that the receipt by appellant in 1967 of certain shares of stock should have been reported as taxable ordinary income in that year. The appellant maintained that he had purchased the shares in 1967 when he executed the promissory note and that the retransfer of the shares to the original seller was a legitimate capital gain transaction. The jury returned a verdict of not guilty as to Counts 1 and 2 and guilty under Count 3. Appellant appealed his conviction and sentence under Count 3 and this court reversed and remanded. *United States* v. *Ragano,* supra.

In the prior appeal the reversal rested on two evidentiary matters. First, we held that the trial court erred in allowing a tax expert for the prosecution to testify that receipt of the shares of stock by appellant was payment for services. We held additionally that appellant's Sixth Amendment right of confrontation was infringed by the admission into evidence over objection of testimony that S. A. Rizzo, from whom the stock was obtained, had testified in an unrelated proceeding, to the effect that the

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[2] § 7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury. — Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or . . . .

BLEED THROUGH

stock had been given to Ragano for services rendered. *United States* v. *Ragano,* supra, 476 F.2d at 415.

Prior to the scheduled date of retrial on the original Count 3, a superseding six count indictment was returned against appellant. Count 1 charged appellant and Rizzo [3] under Title 18, U.S.C. § 371, with conspiracy to defraud the United States in the collection of revenue, by agreeing to disguise the payment of a "finder's fee" to appellant as a stock transaction on which he would claim a long term capital gain. Counts 2 and 3 charged appellant with tax evasion and false swearing in his tax return for the calendar year 1966 for failure to report $29,556.22 of income, in violation of Sections 7201 and 7206(1). Counts 4 and 5 chaged Ragano with tax evasion and false swearing in his tax return for the calendar year 1968 by failing to report income of $33,645.44, in violation of Sections 7201 and 7206(1). Count 6 charged Rizzo with a 7206(1) offense, respecting his 1969 return's treatment of the Two Seasons stock delivered to Ragano. Count 6 was severed prior to trial and later dismissed. Note 3, supra. Appellant moved to dismiss the indictment on grounds of former jeopardy and collateral estoppel.[4] The district court denied appellant's motion, finding that the offenses charged in the superseding indictment were not identical to those in Counts 1 and 2 of the original indictment, and that no issue of fact as to any count of the superseding indictment could be said to have been resolved in appellant's favor at the first trial. A jury found appellant guilty of all five counts, and he was sentenced to five years imprisonment on each of Counts 1, 2, and 4, and to three years imprison-

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[3] Rizzo's motion to sever the charges against him was granted prior to trial. Subsequently, Rizzo's motion to dismiss the indictment as to him as granted, for reasons unrelated to this appeal.

[4] Appellant first moved for dismissal of Count 5 on the ground that he was denied a speedy trial. Subsequently, he enlarged his collateral estoppel contention to include Count 5.

ment on each of Counts 3 and 5. All sentences were directed to be served concurrently, execution of the sentences was suspended, and appellant was placed on three years probation.[5]

The Underlying Facts

The facts involve a complicated series of transactions. We delineate them in the view most favorable to the government. *Glasser* v. *United States*, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704. In 1964 or 1965 Salvatore A. Rizzo, also known as Sam Rizzo, approached Ragano to seek his assistance in obtaining a five million dollar loan from the Southeast and Southwest Areas Pension Fund of the International Brotherhood of Teamsters (Pension Fund). Appellant agreed to assist Rizzo, and traveled to Chicago on several occasions to discuss the proposal with trustees of the Pension Fund. He did not, however, formally represent Rizzo at the Pension Fund meetings at which the loan was discussed. For his assistance in obtaining loans of this type, appellant would in common practice be entitled to a "finder's fee" of 5% of the loan proceeds from the recipient of the loan.[6] The Rizzo loan application was submitted to the Pension Fund on February 9, 1965, and approved on March 3. On January 29 of that year articles of incorporation were approved for Two Seasons, Inc., a Florida corporation, organized for the purpose of acquiring and developing real estate. On the same date that

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[5] The government stipulated prior to trial that the second trial would constitute a retrial for sentencing purposes within the meaning of *North Carolina* v. *Pearce*, 1969, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656. Thus, if convicted appellant would not be sentenced to a term more severe than had been imposed under Count 3 of the original indictment.

[6] In sworn testimony before a Florida legislative committee appellant testified that a "finder's fee" of 5 to 10% was normal for the services of an individual for obtaining loans of this kind. On at least two other occasions appellants received similar fees.

BLEED THROUGH

the loan application was submitted to the Pension Fund the first meeting of Two Seasons was held. Rizzo was elected chairman of the Board and President. All fifty shares of stock in the company were issued jointly to Rizzo and his wife.

Appellant received a check for $15,000 from Two Seasons on May 11, 1965, which was charged on the company's books to the "Acquisition Costs" account. A second payment of $10,000 on September 22, 1965 to appellant was charged as a legal expense on the company's books. From November 15, 1965 through 1967 appellant received amounts ranging up to $30,000 from Two Seasons which were recorded on the company's books as loans. These loans, however, were neither secured by promissory notes nor was interest provided for or paid on them. By the end of 1967 these loans under the government's calculations totaled approximately $90,550, of which $30,000 was transferred during the year on the company's books to the "Legal Expense and Land Acquisition Costs" account, leaving a loan balance of $60,550.

During this same period of time Ragano began borrowing funds from two banks. In November 1966 and March 1967 he borrowed $25,000 and $30,000, respectively, from the County National Bank of North Miami Beach. At the beginning of 1965 Ragano owed a balance of $16,500 to the Central Bank of Tampa on an existing loan. Between February 1965 and October 1967, eight additional loans were obtained by him from that bank in amounts ranging between $2,500 and $12,500. Although, interest was paid through September 1967, no principal payments were made on any of these loans after September 1967, except for payments on an installment loan and three payments totaling $1,755.45 on two others. The outstanding balance on these loans as of September 1967 was $43,000. During that same month an employee of Two Seasons, Sheldon Kay, was requested by Rizzo to obtain a $10,000

loan from the County National Bank, which Rizzo would guarantee, the proceeds to be paid to appellant.

On January 3, 1967, Rizzo transferred 20 shares (40%) of Two Seasons stock to Ragano in exchange for appellant's execution of an unsecured, non-interest bearing, demand note in the amount of $50,000. No principal or interest payments were made on this note prior to its cancellation by Rizzo in 1968. At the second trial the government introduced expert testimony showing that the fair market value of the shares on the date of transfer to appellant was $400,000 to $600,000.[7] On the same day that this transaction occurred, appellant was elected vice president of the company and named to the three member board of directors.

The certificate representing the twenty shares held by appellant was retransferred to Rizzo on March 24, 1967, and on November 6, 1967 two certificates of ten shares each were issued to appellant. In March 1967, but as of January 3, 1967, appellant in connection with a loan application filed with the County National Bank listed his assets to include the twenty shares of Two Seasons stock valued at $2,288,000. However, neither the $50,000 demand note held by the Rizzos nor any of the loans on the Two Seasons books were listed among his liabilities.

In December 1967, appellant delivered ten shares of the Two Seasons stock to the County National Bank as security for his outstanding loans. The bank was instructed by appellant to deliver the stock certificate to the person designated at the time the loans were repaid. On approximately January 2, 1968, appellant went to the County National Bank and introduced Louis Galliano to the bank officers. Mr. Galliano procured a loan from the bank nominally in the name of Assured Home Improvement Co., which was

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[7] Appellant in a loan application listing his assets and liabilities as of January 3, 1967 valued the 20 shares at $2,288,000.

BLEED THROUGH

secured by the same ten shares of stock which the bank already held as security for the loans of appellant. The $30,000 proceeds of this loan were delivered to appellant who used $10,000 of this amount to retire the loan taken out by Sheldon Kay the previous September. At the conclusion of this transaction Frank Ragano had received payments of approximately $250,000, 5% of $5,000,000, from Two Seasons and the various bank loans.

Appellant and Rizzo on January 2, 1968, executed a shareholders' agreement providing that if either stockholder pledged his stock as security for indebtedness and that indebtedness came into default, the remaining stockholder would have the right to pay the obligations, to redeem the stock pledged, and assume full ownership of it. By a handwritten codicil (so labeled) to this agreement dated January 12, 1968, the appellant assigned the 20 shares to Rizzo "in consideration for the said S. A. Rizzo assuming the present indebtedness of the undersigned to the Central National Bank of Tampa, Florida, and the County Bank of North Miami Beach, Florida, and also holding the undersigned harmless and no longer indebted to the said corporation [Two Seasons] for loans made by the said corporation to the undersigned." The codicil did not mention the January 1967 promissory note given by Ragano to the Rizzos, although it was apparently canceled by this transfer.

Subsequently, on April 18, 1968, Rizzo paid the $68,000 balance on all of the County National Bank loan accounts and received the ten shares appellant had pledged as security. The certificate for the other ten shares remained in appellant's possession until mid-August 1968, when he delivered it to the Central Bank of Tampa, with instructions to deliver it to the person paying off his loan balances at that bank. On August 20, 1968, Rizzo sent an employee of Two Seasons to that bank with a check in the amount of $51,108.12 to pay the full balance on appellant's

nine accounts and to take possession of the stock certificate. Subsequently, the two ten-share stock certificates were canceled and a replacement certificate was issued to Rizzo. In September 1968 Rizzo caused the loan balances on the books of Two Seasons in appellant's name to be transferred as loan receivables from him.

Double Jeopardy

On this appeal Ragano bases his primary challenge to his conviction upon the protections of the double jeopardy clause of the Fifth Amendment to the Constitution.

First, he contends that by appealing his conviction for false swearing in his 1968 tax return (Count 3 of the original indictment and Count 5 of the subsequent indictment) he consented to be retried only under the particular theory and factual characterizations urged by the the government at the first trial. The record of the first trial indicates that the government prosecuted appellant on the theory that although the sale of the stock to Rizzo in 1968 was a valid long term capital gain transaction, the original receipt of the stock by appellant was income in that it was transferred to him in lieu of a "finder's fee." Therefore, it should have been reported by him as income in his 1967 tax return. Prior to the retrial on Count 3, of the original indictment, the government in re-evaluating the evidence [8] in light of the jury's verdict and the trial judge's [9] com-

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[8] The government concedes on this appeal that the theory on which it based the subsequent indictment was considered and rejected by the government prosecutors *prior to the original indictment.*

[9] The trial judge at the first trial in a conference with the attorneys noted that the jury might reject the government's characterization of the case, as well as the defendant's defense:

"The Court: But that [the value of the shares received by appellant] is for the jury to determine. Let me say this other thing too. The jury can conclude that he is going to get 5

BLEED THROUGH

ments at the first trial decided to seek a subsequent indictment, based on a different theory than urged by the government at the first trial. Thus, at the retrial the government attorneys characterized the stock transaction as a sham used to disguise the payment to appellant of a "finder's fee" in the form of loans, and that those loans were income to the appellant and on which income taxes were due and owing. Appellant contends that this shift on the part of the government in its presentation of its case was improper, and precluded by the double jeopardy clause, both as to the retrial on the original Count 3 conviction and on the additional counts alleged in the subsequent indictment.

[1] Appellant's argument as to the retrial on Count 3 of the original indictment (Count 5 of the subsequent indictment) entirely overlooks the right of the government to retry a defendant for the same offense after the reversal of a prior conviction. It is a hornbook principle that when a defendant by a successful appeal secures a reversal of a criminal conviction, a later retrial for the same offense does not twice put him in jeopardy. *United States* v. *Jorn*, 1971 400 U.S. 470, 484, 91 S.Ct. 547, 27 L.Ed.2d 543; *United States* v. *Ewell*, 1966, 383 U.S. 116, 124-25, 86 S.Ct. 773, 778-79, 15 L.Ed.2d 627, 633; *United States* v. *Panzavecchia*, 5 Cir. 1971, 446 F.2d 1293, cert. denied 1971, 404 U.S. 966, 92 S.Ct. 343, 30 L.Ed.2d 286. The rationale for this rule has been stated by the Supreme Court as:

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percent fee on the loan, and that the stock was just a vehicle to try to get capital gain treatment with it because when he did sell it, it was worth far more than—whatever it was he got for it, if he really owned it.

I think that they can draw those inferences.

• • • • • • • • • •

The jury can infer from the fact that this fellow sold him stock for nothing, and the way they handled the certificate, that is just a charade, the stock was . . . ."

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

United States v. *Tateo*, 1964, 377 U.S. 463, 466, 84 S.Ct. 1587, 1589, 12 L.Ed.2d 448, 451; *See also United States* v. *Ewell*, supra, 383 U.S. at 121, 86 S.Ct. at 777, 15 L.Ed.2d at 631.

[2] Ragano insists nevertheless that the doctrine of collateral estoppel bars the government from adopting for purposes of retrial, following prior conviction, a different theory of the case than that relied upon at the original trial. *Ashe* v. *Swenson*, 1970, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469, is the asserted authority for this contention. The Supreme Court held in *Ashe* that the doctrine of collateral estoppel was intertwined with the constitutional guarantee against double jeopardy. That case denied the right to try Ashe for armed robbery in one of six participants in a poker game following his acquittal at an earlier trial for robbing another participant in the same game. The Supreme Court found that the only rationally conceivable issue before the jury in the earlier trial was whether the defendant had been one of the robbers, and the jury verdict in that trial showed that he had not. Thus, in the second trial the same issue was before a second jury with the iden-

BLEED THROUGH

tity of the victim the only change. The Court said the second trial was precluded by the not guilty verdict on the earlier charge, and that collateral estoppel prohibited the relitigation of facts previously determined in the defendant's favor. The Court stated that the doctrine of collateral estoppel was:

> simply that when an issue of *ultimate fact* has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Id. at 443, 90 S.Ct. at 1194, 25 L.Ed.2d at 475 (emphasis added).

[3] The doctrine of collateral estoppel as delineated in *Ashe* thus deals with facts not theories. See *United States* v. *Kehoe*, 5 Cir. 1975, 516 F.2d 78, 84 at n. 8. *United States* v. *Smith*, 5 Cir. 1973, 470 F.2d 1299. Nonetheless the appellant stresses language in *Ashe* condemning the prosecution in that case for using the first trial as "a dry run for the second prosecution." *Id.* at 447, 90 S.Ct. at 1196, 25 L.Ed.2d at 477. We hold that *Ashe* has no applicability in the circumstances of this case to the retrial of the charges in Count 3 in the original indictment following the reversal of the prior conviction on that count. What and all that the decision in *Ashe* condemned was the government's retrial of ultimate facts which had previously been decided in a defendant's favor. The case decided nothing respecting the government's right to alter its theory of the evidence in a case at a retrial following reversal of a prior conviction for the same offense. So restricting the prosecution from proceeding upon a new legal theory at retrial would erode severely the goals served by permitting retrial of a criminal defendant after the reversal of a conviction. The argument fails.

[4] The second theory Ragano advances as to double jeopardy is that the government was barred by the prior

prosecution from indicting him in a subsequent indictment on charges *not contained in the original indictment.* Specifically, tax evasion and false swearing in his 1966 tax return (Counts 2 and 3), tax evasion in his 1968 tax return (Count 4), and conspiracy to defraud the government in the collection of revenue (Count 1). We need go no further than to consider this claim as it relates to the conspiracy count. The trial court imposed concurrent five year sentences under Counts 1, 2 and 4, and two concurrent three year sentences under Counts 3 and 5. Under the concurrent sentence doctrine if the conviction is sustained as to the conviction under Count 1 (one of the counts as to which concurrent sentences were imposed) it is unnecessary to determine the legality of the conviction under the remaining counts. *United States* v. *Stone,* 5 Cir. 1973, 472 F.2d 909; *United States* v. *Rector,* 5 Cir. 1973, 488 F.2d 1079; *United States* v. *Vigo,* 5 Cir. 1970, 435 F.2d 1347. Cf. *Benton* v. *Maryland,* 1969, 395 U.S. 784, 791, 89 S.Ct. 2061, 23 L.Ed.2d 707.

[5, 6] Preliminary to a discussion of Count 1 we emphasize the Supreme Court's observation that "[c]onspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object." *Braverman* v. *United States,* 1942, 317 U.S. 49, 54, 63 S.Ct. 99, 102, 87 L.Ed. 23, 28. See also *Callanan* v. *United States,* 1961, 364 U.S. 587, 593, 81 S.Ct. 321, 325, 5 L.Ed.2d 312, 317. We have consistently held that the commission of a substantive offense and entering a conspiracy to commit that offense are separate and distinct, and that ordinarily a person may be convicted of and sentenced for both. *United States* v. *Marshall,* 5 Cir. 1975, 513 F.2d 274; *United States* v. *Jasso,* 5 Cir. 1971, 442 F.2d 1054, 1056, cert. denied 1971, 404 U.S. 845, 92 S.Ct. 146, 30 L.Ed.2d 81. Accord, *United States* v. *Jackson,* 10 Cir. 1973, 482 F.2d 1167, cert. denied 1974, 414 U.S. 1159, 94 S.Ct. 918, 39 L.Ed.2d 111.

In *Jasso,* supra, the defendant was reindicted and convicted after an appeal on which the government confessed error at the original trial. In addition to the three substantive marijuana smuggling counts contained in the original indictment, the new indictment charged Jasso and others with conspiring, in violation of Title 26, U.S.C. § 176(a), to smuggle, transport and conceal marijuana. We rejected Jasso's argument that the double jeopardy clause barred inclusion of the conspiracy count in the new indictment, stating: "[t]he government could have charged conspiracy at any time within the statutory limitation period without regard to any existing indictment for the marijuana offenses. An indictment for a new and different crime is clearly not double jeopardy." 442 F.2d at 1056. To like effect in *Marshall,* supra, a defendant was indicted for conspiracy to possess cocaine with intent to distribute and to cause distribution. The indictment alleged 27 overt acts, seven involving the defendant. Three of the seven had served as the basis for three substantive counts of an earlier indictment to which the defendant had entered guilty pleas. On appeal from conviction of the conspiracy charge the defendant urged that the conspiracy indictment, in light of his guilty plea to the earlier charges, infringed his double jeopardy rights, and precluded any effective defense on his behalf. We rejected each of these arguments noting that the substantive offenses and the conspiracy offense were separate chargs requiring "distinct elements of proof."

Appellant, however, maintains that the "same transaction" definition of "same offense" in the double jeopardy clause, barred the government from indicting him on the conspiracy count since it was not contained in the original indictment. This argument stems from the view advanced by the concurring opinion in *Ashe* of Justice Brennan, joined by Justices Douglas and Marshall, that the double jeopardy clause requires the government to join in one trial all charges against a defendant that grow out of a

single criminal act, occurrence, episode, or transaction. *Ashe*, supra, 397 U.S. at 453-54, 90 S.Ct. at 1199-1202, 25 L.Ed.2d at 481.

The government responds that the "same transaction" test, as proposed by Justice Brennan, has no application to retrials following the reversal of a prior conviction, since its sole purpose is to restrict the use of multiple trials on closely related charges when the government's interest could be vindicated in a single trial. Hence the government maintains that in the case of retrials after reversal of a prior conviction the government may indict on additional charges since the number of trials has been limited to the fewest possible.

[7] We find it unnecessary to decide the applicability of the "same transaction" definition of "same offense" to this case. This circuit has previously declined to apply the "same transaction" definition on the ground that although entitled to some weight the views of only three Justices are not binding. *United States* v. *Marshall*, 5 Cir. 1875, 513 F.2d 274; *United States* v. *Smith*, 5 Cir. 1973, 470 F.2d 1229; *Wingate* v. *Wainwright*, 5 Cir. 1972, 464 F.2d 209. Accord *Brown* v. *Hendrick*, 3 Cir. 1970, 431 F.2d 436, 440, cert. denied 1971, 402 U.S. 976, 91 S.Ct. 1677, 29 L.Ed.2d 141; *Moton* v. *Swenson*, 8 Cir. 1973, 488 F.2d 1060; *United States* v. *Fusco*, 7 Cir. 1970, 427 F.2d 361.

Evidentiary Rulings

Appellant next challenges his conviction on the grounds that the trial court erred in receiving in evidence certain corporate documents and tax returns, and in excluding from evidence the contents of a letter from the accountant of Two Seasons to the appellant's accountant. We deal first with the admissibility of the documents allowed in.

[8] As part of the government's case it argued that appellant was never in fact a bona fide shareholder or

officer of Two Seasons, and, therefore, the transfer of the stock to him and its subsequent sale was merely an attempt to disguise the payment of his finder's fee. The government sought to show this proposition through certain corporate reports filed with various departments of the State of Florida, which purported to list all of the directors, officers, and, in one instance, the shareholders of Two Seasons during the period in which appellant purportedly owned the stock. In none of these documents does appellant's name appear in any capacity. The documents involved consist of: (i) an annual corporate report, filed in July 1967, (ii) a certificate of amendment to the articles of incorporation, filed in November 1967, (iii) an application for a beverage license, filed in January 1968. These documents were offered by the prosecution as public records of the State of Florida, and appellant stipulated as to their genuineness, authenticity, and official character. However, when the government sought to have these documents entered into evidence, appellant objected on the ground that these were hearsay statements of Rizzo, as President of Two Seasons, regarding the status of appellant in the corporation and therefore inadmissible.[10] Fur-

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[10] In *Ragano I*, supra, we held that the trial court erred in admitting into evidence the testimony of an IRS agent relating to an alleged admission by appellant regarding Rizzo's testimony before a state legislative committee. Rizzo had testified that appellant had earned the stock as a finder's fee and attorney's fee, and had not actually purchased the stock. When the IRS agent questioned appellant as to the truthfulness of this statement, appellant admitted that he was aware of it but stated that its substance was untrue. At trial the agent's testimony relating to this exchange was admitted over objection as an admission by appellant. This court held that the receipt of the agent's testimony relating to Rizzo's testimony was hearsay, and, in light of appellant's clear denial of the truth of that testimony, appellant's Sixth Amendment right of confrontation had been denied. *United States* v. *Ragano*, 476 F.2d at 414-16. On the present appeal, Ragano maintains that the testimony of Rizzo is being indirectly admitted through the corporate documents here involved.

ther, appellant alleges that during the period when these documents were filed his relations with Rizzo were strained, and, therefore, Rizzo had a motive to falsify the documents.

In our judgment the documents in question satisfy the requirements of the Federal Business Records Act, Title 28, U.S.C., Section 1732(a), and thus qualify as an exception to the hearsay rule. Further, we hold that the admission of this documentary evidence was cumulative, and the error, if any, was harmless error, which did not prejudice appellant's rights. Rule 52(a), F.R.Crim.P.; *United States* v. *Quong*, 6 Cir. 1962, 303 F.2d 499.

[9-11] In *Sabatino* v. *Curtiss National Bank*, 5 Cir. 1969, 415 F.2d 632, Judge Thornberry extensively analyzed the purpose and effect of the Business Records Act, setting forth a three-pronged test for determining the admissibility of business records:

(1) the records must be kept pursuant to some routine *procedure* designed to assure their accuracy,

(2) they must be created for *motives* that would tend to assure accuracy (preparation for litigation, for example, is not such a motive), and

(3) they must not themselves be mere cumulations of hearsay or uniformed opinion.

415 F.2d at 637 (emphasis in original). We find that all of the documents in dispute in this case satisfy these guidelines. The *Sabatino* requirement that the documents be prepared for "motives" to assure accuracy is fulfilled by the fact that each was required by the state to be filed as a condition of corporate existence, and the loss of corporate privileges could result from a failure to file or by filing intentionally false documents. Florida Stat. §§ 608.04, 608.041, 608.351. The failure by the government to lay a foundation, in the form of testimony by an employee of

BLEED THROUGH

Two Seasons as to the procedure used in preparing and filing these documents does not affect their admissibility, in light of the stiplation as to their authenticity and the fact that they were filed and prepared in the regular course of business. Cf. *Meister* v. *C. I. R.*, 3 Cir. 1974, 504 F.2d 505; *United States* v. *Henderson*, 8 Cir. 1971, 446 F.2d 960, 966-67; *Carroll* v. *United States*, 9 Cir. 1963, 326 F.2d 72. Appellant's testimony as to his strained relations with Rizzo affected only the weight to be accorded the documents, not their admissibility.[11] See *United States* v. *Re*, 2 Cir. 1964, 336 F.2d 306.

[12] Additionally, the records objected to were similar in form and tenor to a document designating a resident agent for Two Seasons, already in evidence without objection which failed to list Ragano as either officer or director. Finally, both an employee and an officer of Two Seasons testified that in the realm of their duties neither had any knowledge of appellant's having the authority of an officer or director of the corporation. We hold therefore that the documents were merely cumulative of other evidence before the jury. *United States* v. *Quong*, supra, 303 F.2d at 504.

[13] On similar grounds Ragano maintains that prejudicial error was committed by the admission into evidence of the corporate income tax returns of Two Seasons, for the periods ending in March 1967 and March 1968. At the first prosecution these tax returns were received in evidence, with no error being claimed in this respect on the prior appeal. However, this court saw fit "in the interest of trial economy", 476 F.2d at 418, to direct attention to

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[11] The Business Records Act, Title 28 U.S.C. § 1732(a) provides in part:

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> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

Greenbaum v. *United States,* 9 Cir. 1935, 80 F.2 113, 125, regarding the admissibility of tax returns. In *Greenbaum* the Ninth Circuit held that income tax returns were hearsay when used against an individual other than the maker, unless some relationship between the tax return and the individual against whom they were sought to be used could be found. 80 F.2d at 125-26. Leaving to one side the questionable continuing vitality of *Greenbaum* as precedent, we note that in the present case the tax returns were admitted for the limited purpose of use by the government expert witness in arriving at the evaluation of Two Seasons stock. They were useful for this purpose because they contained detailed schedules of land sales made by the corporation. With other records and documents, also in evidence, these tax returns provided an accessible and convenient source of supporting data on which to arrive at a valuation of the Two Seasons shares. The trial court's admission of the corporate tax returns for this stated limited purpose was not error. This is underscored by Ragano's claim in his loan application to County National Bank that the twenty shares had a value of $2,288,000, as contrasted to government testimony fixing the value at $400,000 to $600,000. See Note 7, supra, and accompanying text. Clearly, this evidence did not projudice Ragano's case.

Ragano also contends that the trial court erred in excluding from evidence a letter from the accountant for Two Seasons to Ralph Andretta, appellant's accountant, setting forth the former's interpretation of the tax consequences of the stock transactions. At trial the government called Andretta, and questioned him regarding the sources of information he employed in determining appellant's tax liabilities for the years in question.[12] In responding to this

[12] In passing we note Andretta's testimony, not questioned by Ragano, that in 1965 or 1966 appellant questioned Andretta as to the potential tax consequences of his receiving stock in Two Seasons in lieu of his finder's fee. Andretta responded that appellant

BLEED THROUGH

inquiry Andretta stated that he had relied on a yearly "recap of fees" which had been sent by Two Seasons' accountant, Nelson Whyte, to him. Appellant's counsel sought on cross-examination to question Andretta as to the extent of the reliance placed in Andretta and Whyte by Ragano in calculating his tax liabilities and treating the stock transaction as one producing long term capital gain. In this regard the trial judge permitted appellant's counsel to show Andretta the letter from Whyte, and to inquire as to whether he had relied on the contents of the letter in determining the manner in which to report the stock transaction. The trial judge refused however to permit the contents of the letter to be published through Andretta, since it embodied also the opinion of another accountant not a witness, hence not available for examination as to his rationale in reaching that opinion. Appellant's counsel thereupon stated that he did not at this time intend to publish the letter, and that he would be satisfied if Andretta was permitted to identify it and state that he had relied on it.[13] This was permitted by the court. At the

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would still be liable for income taxes on the fair market value of the stock. Appellant then inquired as to the tax consequences of purchasing the stock, to which Andretta replied that any profit realized from the subsequent sale of the stock would be taxed at capital gains rates.

[13] The following exchange occurred out of the presence of the jury:

The Court: . . . You can ask him [Andretta] if this is the letter he relied on.

Mr. Rosen [Appellant's Counsel]: That is precisely what I wanted to do, Your Honor.

The Court: But don't go into the details.

Mr. Rosen: Well, I don't intend to publish it at this point, Your Honor, because I can't offer it out of turn.

The Court: Well, you can't offer it until it is in evidence—you can't publish it until it is in evidence.

Mr. Rosen: That's right.

The Court: All right. Thank you. That is the main reason you are not going to do it.

close of the evidence the trial judge called attention to the fact that appellant's counsel had failed to publish the letter, and had not called Whyte as his witness. Appellant's counsel declined at that time to call Whyte as a witness or to offer the letter for publication.[14]

[14] Ragano urges that the trial court erred in not permitting Andretta to testify regarding the contents of the Whyte letter. We disagree. Appellant's counsel was permitted on cross-examination of Andretta to use the letter

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[14] The following occurred at that time at side bar, out of the jury's hearing:

The Court: To save possible trouble later on—you may have overlooked it—I don't believe that letter from Mr. Whyte to Mr. Andretta was ever received in evidence.

Mr. Tison [The Government's Prosecutor]: No, it wasn't.

Mr. Rosen: It wasn't.

Mr. Tison: That's correct.

Mr. Rosen: I think my position is preserved on the Government's side of the case.

Mr. Tison: Well, he could have brought the man who wrote it.

The Court: I just want——

Mr. Rosen: I am aware of it.

The Court: You had Mr. Whyte under subpoena.

Mr. Rosen: No, I didn't. The government did.

Mr. Tison: We had him under subpoena.

The Court: Can you make him available?

Mr. Tison: Certainly. I told Mr. Rosen——

The Court: He is available?

My ruling was that if Mr. Whyte was available I sustained the Government's objection to its introduction. And I did it on the ground that it should not be received because it does contain an opinion; and it apparently is an opinion which —well, at any rate, it contains an opinion. And where that witness is available he should be called, so that he could be cross-examined about that opinion.

And to put the letter in without that would, in effect, deny the Government the right to confront the witness; and it is hearsay.

Mr. Rosen: Well, I stated my position in the Government's case in chief. I do not propose to call Mr. Whyte.

BLEED THROUGH

to the full extent he requested. Subsequently he declined to call Whyte as a witness to be examined as to the letter in the face of the court's reminder of the state of record. Error is not demonstrated with respect to this incident.

Sufficiency of the Evidence

Lastly we find without merit Ragano's final ground for appeal, that error was committed by the trial court in the denial of his motion for a directed judgment of acquittal, first made when the government rested its case in chief and renewed when both sides announced closed. This contention ties back into the primary point discussed, *supra*, the asserted presence of double jeopardy as a result of the superseding indictment and of the shift in the government's theory of the case between trials. Indeed, it amounts when scrutinized to no more than a corollary to the same contention of "estoppel by argument".

It is urged that because the government's theory in *Ragano I* was that although the defendant acquired the Two Seasons stock in a valid transaction, he treated the tax consequences incorrectly, whereas at the second trial the government traveled on the new indictment on the different and inconsistent theory that the stock transactions were a sham masking the payment of a finder's fee, and hence that the government has placed itself in the position of urging at different times that the same underlying facts support inconsistent and irreconcilable interpretations. This, it is asserted, puts an end to any claim that guilt was established under assertedly accepted standards governing the proof required to establish guilt in circumstantial evidence cases. Reliance is placed upon Fifth Circuit cases, mostly pre-*Holland*,[15] stating that evidence

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[15] *Holland* v. *United States*, 1954, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150. *Holland* held that it is "confusing and incorrect" to instruct the jury that a special rule applies to cases based upon

sufficient to establish guilt in circumstantial evidence cases must not only be consistent with guilt, but inconsistent with innocence. The argument continues that if the evidence is equally consistent with diametrically different guilty theories, it must also be consistent with innocence, or at least is not inconsistent with innocence.

This argument fails in at least two particulars. First, the government's case is based to a slight extent only upon circumstantial evidence. *Inter alia*, the evidence at the second trial consisted of three separate sworn statements of Ragano that the stock transfers represented in some manner his 5% finder's fee for obtaining the $5,000,000 loan. Direct evidence, consisting of actual checks, wire transfers, and the like, traced the receipt of $250,000, 5% of $5,000,- to Ragano. The sole aspect of the government's proof resting on circumstantial evidence was the proposition that it was money, paid in 1966 and 1968, rather than the stock certificate received in 1967, that constituted the actual fee.

[15, 16] Second, assuming contrary to our post-*Holland* decisions [16] that the standard described is appropriate to

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circumstantial evidence, *ibid.* at 139-140, 75 S.Ct. at 137, 99 L.Ed. at 166, continuing: "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." *Ibid.* at 139-140, 75 S.Ct. at 137-138, 99 L.Ed. at 166-167.

[16] Post-*Holland*, the standard for review adopted by this Circuit, to be applied irrespective of whether the evidence is direct or circumstantial, is whether "reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the accused's innocence". *United States* v. *Warner*, 5 Cir. 1971, 441 F.2d 821, 825,

BLEED THROUGH

this appeal, the hypothesis of the 1967 income is *not a hypothesis of innocence* as to this indictment. If credit, the hypothesis is one of guilt as to at least Count 5 of the superseding indictment. Under that theory the reporting of the stock transfers in the 1968 return is as completely false as under the view that the money was the finder's fee, though for different reasons. The hypothesis may well also support the finding of guilt as to Count 1, although in view of the concurrent sentence doctrine we will not lengthen this opinion further by a detailed analysis.

Further, the argument advanced entirely ignores the difference in the government's proof at the two trials. At the second trial some forty additional documents and the testimony of two witnesses demonstrated that at all relevant times a 40% interest in Two Seasons, Inc. was so valuable that it would be unreasonable to suppose that Ragano received a bona fide ownership interest in the stock as payment of the balance due on his finder's fee. Ragano's knowledge of the value of the stock was separately proved by some of his earlier statements and other evidence. In January 1967, when the shares were issued to him, they had a minimum value of at least $400,000, nearly three times the remaining unpaid amount due on his fee. The evidence produced at trial was supportive of a single conclusion only: that the series of stock transfers was no more than a sham designed to create a vehicle to disguise the fee as a capital gain.

The judgment appealed from is
Affirmed.

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cert. denied 1971, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58. See further *e.g. United States* v. *Black*, 5 Cir. 1974, 497 F.2d 1039, 1041; *United States* v. *Amato*, 5 Cir. 1974, 495 F.2d 545; *United States* v. *Edwards*, 5 Cir. 1974, 488 F.2d 1154; *United States* v. *Fontenot*, 5 Cir. 1973, 483 F.2d 315, 321.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-2376

D. C. Docket No. 73-132-CR-T-K

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

versus

FRANK RAGANO, *Defendant-Appellant.*

Appeal from the United States District Court for the Middle District of Florida

Before WISDOM, SIMPSON and RONEY, *Circuit Judges*

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 14, 1975

Issued as Mandate:

BLEED THROUGH

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

January 20, 1976

TO ALL COUNSEL OF RECORD

No. 74-2376—USA v. Frank Ragano

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*

/s/ by SUSAN M. GRAVORS
Deputy Clerk

/smg

cc: Mr. E. David Rosen
Mr. Michael Kinney
Mr. Thomas T. Steele
Mr. Claude Tison, Jr.